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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT

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QUESTIONS PRESENTED

1. In light of *PUD No. 1 of Pend Oreille County and State of Washington v. Tombari Family Limited Partnership, et al.* (State Supreme Court Docket No. 57239-9), did the Ninth Circuit Court of Appeals erroneously apply both state and federal law to locate the boundary of a state's ownership of the beds and shores of a navigable river conveyed by force of the Equal Footing Doctrine?

2. Assuming that it was proper for the court below to apply federal law, does federal law require an absence of vegetation due to the effects of flowing water to locate a state's boundary along the shores of a navigable river?

PARTIES BELOW

Petitioners below were the State of Washington, Department of Natural Resources (State), and Pend Oreille Public Utility District No. 1 (PUD), a municipal corporation of the State of Washington. The Department of Natural Resources of the State of Washington is the administrative agency responsible for management of the beds and shores of all navigable waters of the State. The petitioners were appellants below before the United States Court of Appeals for the Ninth Judicial Circuit. The PUD was a defendant before the United States District Court for the Eastern District of Washington, and the State was an intervenor-defendant before the District Court.

The respondents the United States of America, as trustee for the Kalispel

Indian Tribe and individual allottees, and the Kalispel Indian Tribe, who were appellees before the United States Court of Appeals for the Ninth Judicial Circuit. The United States of America was a plaintiff before the United States District Court for the Eastern District of Washington and the Kalispel Indian Tribe was an intervening-plaintiff before the United States District Court for the Eastern District of Washington.

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PETITION

The State of Washington, Department of Natural Resources and Public Utility District No. 1 of Pend Oreille County jointly petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the opinion in *United States of America, et al. v. Pend Oreille Public Utility District No. 1, et al.*, 926 F.2d 1502 (9th Cir. 1991).

OPINIONS BELOW

On March 6, 1991, the United States Court of Appeals for the Ninth Circuit issued its opinion in *United States of America v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502 (9th Cir. 1991). The State of Washington, Department of Natural Resources (State), and Public Utility District No. 1 of Pend

Oreille County (PUD) both timely filed motions for rehearing and suggestions for rehearing en banc. Those motions for rehearing and suggestions for rehearing en banc were denied by orders of the United States Court of Appeals filed on May 8, 1991.

On August 29, 1983, the United States District Court for the Eastern District of Washington entered Findings of Fact, Conclusions of Law and Judgment established the location of a line of ordinary high water on the Pend Oreille River, from which the PUD and the State of Washington appealed to the United States Court of Appeals for the Ninth Circuit. Both the PUD and State of Washington requested that the United States Court of Appeals certify the issue of the determination of the line of ordinary high

water on the navigable Pend Oreille River to the Supreme Court of the State of Washington, which requests and motions were denied by the United States Court of Appeals. *United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1506, n. 3 (9th Cir. 1991). Both the State and the PUD also requested that the Court of Appeals stay its proceedings pending the determination of the location of the line of ordinary high water under state law in a separate case which was pending and is pending before the Supreme Court of the State of Washington, which requests were denied by the Court of Appeals.

In a separate proceeding before the Superior Court of the State of Washington in Pend Oreille County entitled *Public Utility District No. 1 of Pend Oreille*

County and State of Washington, Department of Natural Resources v. Tombari Family Limited Partnership, et al., Cause No. 85-2-00128-8, the PUD and State raised the issue of the establishment of the boundary of state property along the navigable Pend Oreille River along private property. The State Superior Court dismissed the claim of the PUD and State on the basis that the issue of the determination of such boundary was barred by the doctrine of collateral estoppel based upon the decision of the United States District Court for the Eastern District of Washington established in *United States v. PUD*. Both the State and PUD appealed the decision of the Superior Court to the Supreme Court of the State of Washington in *Public Utility District No. 1 of Pend Oreille County and State of Washington,*

Department of Natural Resources v. Tombari Family Limited Partnership, et al., Washington Supreme Court Docket No. 57239-9. In the appeal, the State and PUD raised the issue of the state law governing the establishment of the boundary of state land along navigable waters. The matter was argued before the Supreme Court of the State of Washington on May 28, 1991, and is currently pending its decision.

JURISDICTION

Jurisdiction rests on 28 U.S.C.A § 1254(1) (1991 Supp.). The opinion of the United States Court of Appeals for the Ninth Circuit was issued on March 6, 1991, and the motion for rehearing was denied on May 8, 1991. Under U.S. Supreme Court Rule 13.1 and 28 U.S.C.A. § 2101(c) (1982), a petition for writ of certiorari

to review a judgment entered by a United States court of appeals may be filed within ninety days after the entry of judgment, which is deemed to be the date of the entry of an order denying the motions for rehearing by the United States Court of Appeals for the Ninth Circuit entered on May 8, 1991.

STATEMENT OF THE CASE[1]

A. The Facts.

In 1889, the State of Washington was admitted into the Union on an equal footing with the Original States. By admission, the State acquired title to the navigable waters of the State and the

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[1]All facts appear in the Opinion of the Circuit Court of Appeals for the Ninth Circuit (926 F.2d 1502) and in the Findings of Fact, Conclusions of Law and Judgment of the U.S. District Court for the Eastern District of Washington. The Opinion and Findings are set forth in the Appendix to this Joint Petition.

soils under them. The Pend Oreille River is located in Pend Oreille County, Washington, and is a navigable river in the State. The State acquired the Pend Oreille River and the soils under it under the Equal Footing Doctrine. A dispute has arisen concerning the boundary of the property acquired and owned by the State.

When the State of Washington was admitted, the State claimed ownership of the beds and shores of all navigable waters in the State up to and including the line of ordinary high water within the banks of all navigable rivers. Washington Constitution, Article XVII, Section 1. The overriding issue in this case is the determination of the line of ordinary high water on the Pend Oreille River.

The Pend Oreille River, as well as all other rivers in the State of

Washington, have an annual hydrological cycle. The waters ordinarily rise to a high level in the spring of the year, and recede to a low level in the summer and fall of the year and remain at low levels until the next spring. There are long-standing reliable hydrological records showing the various flows and stages or elevations of water along the Pend Oreille River commencing around the turn of the century. The average of the spring high waters and the median (50 percent higher and 50 percent lower) of the spring high water on the Pend Oreille River are at a flow of approximately 90,000 cubic feet per second (cfs) which, at the particular location at issue, results in a water surface elevation of 2041 feet above mean sea level (msl).

The evidence shows that vegetation grows along the banks of the Pend Oreille River above the lowest levels reached by the Pend Oreille River during the summer months. Above the spring high water elevation of 2041 feet above mean sea level, there are various species of trees, the land was cultivated and crops were raised, and high quality vegetation for grazing occurs. Below the spring high water elevation of 2041, vegetation did occur which had minimal nourishment value for cattle down to the low water elevation. Such vegetation having minimal nourishment value does and will grow down to the lowest elevations reached by the river during the summer months.

In the early 1950s, various dams were constructed on the Pend Oreille River and its tributaries in Montana, Idaho and

Washington. Among those dams is the Box Canyon Dam owned by the PUD on the Pend Oreille River in Pend Oreille County, Washington. The Box Canyon Dam does not affect the Pend Oreille River during the ordinary spring high water. However, the Box Canyon Dam does affect the elevation of the water on the Pend Oreille River during the low water seasons. Since the Box Canyon Dam was constructed on the bed of the Pend Oreille River and holds water on the shores of the Pend Oreille River during the lower water season, the PUD obtained an overflow easement from the State of Washington which authorized the use of the beds and shores by the PUD for the Box Canyon Dam. In order to avoid any dispute with the Kalispel Indians, the PUD also obtained overflow easements from the United States and the Kalispel Indians

even though the Box Canyon Dam does not hold water above the line established by the ordinary spring high water. The State was not a party to the overflow easements obtained by the PUD.

B. The Proceedings Before the United States District Court for the Eastern District of Washington.

In 1980, the United States, as trustee for the Kalispel Indian Tribe and individual Indian allottees, brought an action against the PUD claiming that the PUD's Box Canyon Dam caused water to trespass upon Indian land in violation of the overflow easements obtained by the PUD. The PUD answered, alleging that the land affected by the PUD's Box Canyon Dam was actually owned by the State of Washington and counterclaimed for declaratory judgment for a determination of the PUD's rights. The Kalispel Indian

Tribe intervened and filed a complaint against the State claiming ownership of the beds and shores of the Pend Oreille River. The State, as an intervenor-defendant, claimed ownership of the beds and shores of the Pend Oreille River and claimed that the boundary of the beds and shores of the Pend Oreille River was the line of ordinary high water established at an elevation of approximately 2041 feet above mean sea level, which is the average or median elevation of the ordinary spring high water.

After a trial, the United States District Court entered Findings of Fact and Conclusions of Law and Judgment (Appendix, page 149a) by which the District Court established, *inter alia*, the following:

(1) The Pend Oreille River is a navigable river;

(2) There are substantial and longstanding hydrological reports for the Pend Oreille River which show, for 40 years prior to the construction of the Box Canyon Dam, the flow and the water surface elevations of the Pend Oreille River;

(3) The Box Canyon Dam does not affect the water surface elevation during the average spring high water of 90,000 cfs which results in a water surface elevation of approximately 2041 feet above mean sea level as measured by the USGS water gage at Cusick, Washington;

(4) The Box Canyon Dam does affect the water surface elevation during the low flow times;

(5) There is a line at elevation 2028 feet msl in the vegetation which is a dividing line between vegetation which is edible by cattle with some minimal nourishment value and below which there is no vegetation;

(6) There is a line in the vegetation at elevation 2041 feet msl above which there is a change in the vegetation from rough grass with minimal nourishment value to grasses containing more nourishment value and above which there are bushes and trees;

(7) No agricultural use (no tilling or cultivation of the soil) of the land occurred below elevation 2041 feet above mean sea level (msl)

before or after the construction of the Box Canyon Dam.

The United States District Court concluded that the law of the State of Washington controls the case. The District Court relied upon language from *Austin v. Bellingham*, 69 Wash. 677, 126 P. 59 (1912), which cited and quoted from *4 Words and Phrases* to determine the law of the State of Washington with respect to the establishment of the line of ordinary high water. The United States District Court concluded that the law of the State of Washington requires that the line of ordinary high water be established at the place where the soils are covered so long by water that no vegetation would grow.

Since vegetation will grow above the lowest levels reached by the water during the summer months, and since the law as

determined by the United States District Court leads to the conclusion that the line of ordinary high water coincides with the line of ordinary low water, the State and the PUD requested that the United States District Court certify the legal issue to the Supreme Court of the State of Washington. The United States District Court denied such request.

It was later discovered that part of the property within the Kalispel Indian Reservation along the Pend Oreille River was actually owned by non-Indians in fee title. Those lands were deleted from the matter pending before the United States District Court.[2]

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[2]At the same time the matter was proceeding before the U.S. District Court, the State and the PUD commenced a separate action in the Superior Court for Pend Oreille County against the non-Indian owners of the land. That action is denominated as *Public Utility District No. 1 of Pend*

The proceedings before the United States District Court for the Eastern District of Washington were divided into three phases. The first phase dealt with the establishment of the boundary of the State's beds and shores--the line of ordinary high water. The second phase dealt with the claim of the Kalispel Indian Tribe to ownership of the beds and shores of the Pend Oreille River.[3] The third phase of the litigation dealt with the issue and determination of damages claimed by the United States on behalf of the Kalispel Indian Tribe and the individual Indian allottees. All issues

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Oreille County and State of Washington v. Tombari Family Limited Partnership, et al., which will be discussed hereafter.

[3]The United States District Court ultimately determined that the State of Washington owns the beds and shores of the Pend Oreille River.

were finally resolved by the United States District Court in December, 1987.

C. Proceedings Before the United States Court of Appeals.

All of the parties appealed various issues before the United States Court of Appeals for the Ninth Circuit. The State and the PUD appealed the determination of the line of ordinary high water and the determination of the law of the State of Washington applied by the United States District Court for the determination of the line of ordinary high water. The line of ordinary high water is the boundary of the beds and shores of the navigable Pend Oreille River owned by the State. Both the State and the PUD requested that the United States Court of Appeals for the Ninth Circuit certify the legal issue concerning state law and the determination

of the line of ordinary high water to the Supreme Court of the State of Washington. After oral argument, both the State and the PUD requested that the United States Court of Appeals stay ruling on the matter until a decision was rendered by the United States Supreme Court in *Public Utility District No. 1 of Pend Oreille County and State of Washington v. Tombari Family Limited Partnership, et al.*, Supreme Court Docket No. 57239-9.

The United States Court of Appeals refused to certify the legal issue of state law regarding the determination of the line of ordinary high water to the Supreme Court of the State of Washington and further refused to stay its ruling on the matter. *United States v. PUD, supra*, at 1506, n. 3. On March 6, 1991, the United States Court of Appeals for the

Ninth Circuit rendered its opinion in *United States, et al. v. Pend Oreille Public Utility District No. 1, et al.*, 926 F.2d 1502 (9th Cir. 1991). In its decision, the Ninth Circuit Court of Appeals concluded that both federal and state law are the same and require that the trial court ignore the annual spring high water in determining the line of ordinary high water. *Id.* at 1505. The United States Court of Appeals also rejected the requests of the State and the PUD that the legal issue of the determination of the line of ordinary high water and the law of the State of Washington be certified to the Supreme

Court of the State of Washington. *Id.* at 1506, n. 3.[4]

The PUD and the State have also urged the Court of Appeals for the Ninth Circuit to recall its judgment and mandate, pending the decision of the United States Supreme Court in *PUD v. Tombari Family Limited Partnership.* To date, the Ninth Circuit Court of Appeals has not acted on the requests of the PUD and State to recall the judgment. Therefore, this Joint Petition for Writ of Certiorari is filed because the time limits for seeking review of the decision of the Court of Appeals will expire before the Court of

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[4]The U.S. Court of Appeals disregarded the administrative practice of the Department of Natural Resources, State of Washington, as an indication of Washington law, which administrative practice differed from the Court of Appeals' construction of *Austin v. Bellingham.*

Appeals acts on such requests for recall of judgment.

D. Proceedings Before the Supreme Court of the State of Washington.

The State and PUD commenced an action in the Superior Court for Pend Oreille County in the State of Washington seeking a determination of the law of the State of Washington with respect to the establishment of the line of ordinary high water on the navigable Pend Oreille River along property within the Kalispel Indian Reservation owned by the Tombari Family. The Superior Court dismissed the claim of the State of Washington and the PUD that the line of ordinary high water was at the elevation reached by the ordinary spring high water of the Pend Oreille River. The Superior Court held that the issue had been previously determined by the United

States District Court for the Eastern District of Washington in *U.S. v. PUD* and that the State and the PUD were barred from relitigating the issue under the doctrine of collateral estoppel. The State and the PUD appealed that decision to the Supreme Court of the State of Washington, arguing that the determination of the line of ordinary high water is the boundary of the beds and shores of the Pend Oreille River owned by the State and that such determination is a matter of great public interest and that the United States District Court erred in its determination of state law in *U.S. v. PUD*.

The issue concerning the law of the State of Washington to be applied in the establishment of the line of ordinary high water as the boundary of the beds and shores of the Pend Oreille River owned by

the State and the propriety of the application of the doctrine of collateral estoppel in dismissing the claims of the State and the PUD with respect to such determination is pending before the Supreme Court of the State of Washington in *Public Utility District No. 1 of Pend Oreille County and State of Washington, Department of Natural Resources v. Tombari Family Limited Partnership, et al.*, as Washington Supreme Court Docket No. 57239-9. The matter was argued before the Supreme Court of the State of Washington on May 28, 1991. Both the State and the PUD expect that the Supreme Court will rule as to the law of the State of Washington to be applied in the establishment of the line of ordinary high water under the Washington Constitution, Article XVII, Section 1, which is the

boundary of the beds and shores of navigable rivers owned by the State of Washington. The ruling of the Supreme Court of the State of Washington in *PUD v. Tombari Family Limited Partnership* may occur at any time.

REASONS FOR GRANTING THE WRIT

A. Introduction.

The legal issues concern matters of great importance and interest to the people of the State of Washington since the ultimate issue relates to essential sovereign prerogatives and rights of the State of Washington acquired upon its admission into the Union--sovereignty and ownership of navigable waters and the soils under them. There is a substantial likelihood that the holding of the Ninth Circuit Court of Appeals and the United States District Court will be in conflict

with the ruling of the Supreme Court of the State of Washington on the legal question of the determination and establishment of the boundary of the navigable waters and the soils under them which are held by the State as part of its sovereign prerogatives and rights. The boundary of the navigable waters and the soils under them held by the State is to be determined according to the law of the sovereign state where such navigable waters and soils are located. In the State of Washington, the State owns the beds and shores of navigable rivers up to and including the line of ordinary high water as determined under the law of the State under the Constitution of Washington, Article XVII, Section 1.

If a writ of certiorari is not granted and if the decision of the Supreme

Court of the State of Washington in *PUD v. Tombari Family Limited Partnership* conflicts with the decision of the Court of Appeals in *United States v. PUD*, the rights and interests of the State and all of the people of the State will be prejudiced by diminishment of the State's title to shorelands along the Pend Oreille River adjacent to the Kalispel Indian Reservation. Prejudice to the sovereignty of the people of Washington may be avoided by granting the petition submitted by the State and PUD herein and issuing a writ of certiorari. If the decision of the Supreme Court of the State of Washington in *PUD v. Tombari Family Limited Partnership*, when issued, does <u>not</u> conflict with the decision of the Ninth Circuit Court of Appeals in *United States v. PUD*, the State and the PUD agree to

withdraw this petition for a writ of certiorari.

B. The Issue Before the Court Is a Matter of Great Public Importance and Great Public Interest to the People of the State of Washington.

After the Revolutionary War, each of the original States became sovereign and, as such, hold the absolute right to all of their navigable waters and the soils under them for their common use, subject only to the rights surrendered by the original States under the United States Constitution. *Martin v. Lessee of Waddell*, 41 U.S. [16 Pet.] 367, 410 (1842). New states are admitted into the Union on an equal footing with the original States. *Pollard's Lessee v. Hagan*, 44 U.S. [13 How.] 212, 228-229 (1845). Navigable waters and the soils are held by a state in public trust for the use and benefit of

all of the people. A state does not have the power to substantially impair the interests of the public in navigable waters and the soils under them. *The Illinois Central Railroad Company v. State of Illinois*, 146 U.S. 387, 452-453 (1892). The control and ownership of navigable waters and the soils under them are very strongly identified with the sovereign power of state government. *Montana v. United States*, 450 U.S. 544, 552 (1981). Thus, the decision of the Court with respect to the ownership of navigable waters and the soils under them and the boundary of such ownership relates to essential sovereign rights and powers of a state, which sovereign rights and powers were obtained by the original States by virtue of the Revolutionary War and have

been obtained by new states under the "equal footing doctrine."

In its Constitution, the State of Washington declared its ownership of the beds and shores of navigable rivers up to and including the line of ordinary high water. Washington Constitution, Article XVII, Section 1. Furthermore, the Supreme Court of the State of Washington has affirmed the public interests of the people of Washington and has confirmed and applied the public trust doctrine in the state of Washington with respect to the beds and shores of navigable waters. *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987). The significance of the ownership and sovereignty over navigable waters and the soils under them held by states has been recognized in other cases of this Court. *See Phillips Petroleum*

Company v. Mississippi, 484 U.S. 469 (1988) and *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). Thus, any decision which affects the interests of a state in the navigable waters and the soils under them is a matter of great public interest and import to the people of the State.

C. The Decision of the Ninth Circuit Court of Appeals Is or May Be In Conflict With Decisions of the Supreme Court of Washington.

In its decision, the Ninth Circuit Court of Appeals concluded that with respect to the establishment of the boundary of the beds and shores of navigable waters owned by the State, the federal law and law of the State of Washington are the same. *United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1505 (9th Cir.

1981). The Ninth Circuit then concluded that both the federal law and the state law required that the line of ordinary high water in the state of Washington be established where water is on the soil so long that "vegetation will not grow on it." *Id.* at 1506. The court cited *Howard v. Ingersoll*, 54 U.S. [13 How.] 409 (1851) and *Austin v. City of Bellingham*, 69 Wash. 677, 126 P. 59, 61 (1912). The court also concluded that evidence concerning the elevation to which the water ordinarily rises during the spring high water should be excluded and disregarded since such evidence was immaterial.[5] *Id.*

[5]The Ninth Circuit Court of Appeals denominated the high water which ordinarily occurs in the spring as "floods" and then concluded that evidence concerning such "floods" is immaterial and should be disregarded. 926 F.2d at 1506.

The evidence before the District Court and before the Ninth Circuit Court of Appeals and the evidence before the Supreme Court of the State of Washington is that vegetation will grow on the soils along the shores of navigable rivers in the State of Washington down to the lowest levels reached by the water during the summer months. All of the information before the court shows that the ordinary hydrological cycle of the Pend Oreille River and others rivers in the state of Washington include an ordinary high water that occurs in the spring followed by a recession of the water down to low water which occurs in the late summer. If the "line of ordinary high water" is defined as the lowest elevation to which edible vegetation will grow and is the line below which vegetation will not grow due to the

presence of water, the line of ordinary high water coincides with and actually means the line of ordinary low water contrary to the assertion of title to the beds and shores of navigable rivers in the Washington Constitution, Article XVII, Section 1.

The only decision of the Supreme Court of the State of Washington which deals in any significant way with a description of the line of ordinary high water on fresh water is found in *Austin v. Bellingham, supra*. The *ratio decidendi* of *Austin v. Bellingham* does not apply to the facts herein and since it does not appear that facts similar to the facts herein have ever been submitted to the Supreme Court of the State of Washington for determination, the State and PUD both requested that the Court of Appeals and

the United States District Court certify the legal question to the Supreme Court of the State of Washington pursuant to Ch. 2.60, Revised Code of Washington. The Court below refused to certify the legal issue of state law to the Supreme Court of the State of Washington with respect to the determination of the line of ordinary high water as the boundary of the navigable waters and soils owned by the State. Therefore, the Court below abused its discretion.

In a parallel case in State court, both the State and the PUD brought an action against non-Indian owners of land within the Kalispel Indian Reservation which is adjacent to the area at issue in *United States v. PUD*. The issues that are raised herein and the determination of state law with respect to the boundary of

the navigable waters and lands owned by the State is now pending in *Public Utility District No. 1 of Pend Oreille County v. Tombari Family Limited Partnership*, Supreme Court of Washington Docket No. 57239-9. The issue has been argued. The Supreme Court of Washington may render a decision concerning the determination and location of the line of ordinary high water on navigable rivers at any time. If, as argued by the State and the PUD, the Supreme Court of Washington determines that the language from *Austin v. Bellingham* quoted and relied upon by the Court of Appeals and the District Court is, in fact, *dicta* and is not the law of Washington to be applied under the facts of this case along the Pend Oreille River, there will be a conflict between the law of the State of Washington as determined

by the United States Court of Appeals and the law of the State of Washington as determined by the Supreme Court of the State of Washington, which is the final arbiter of state law.

D. The Boundary of Navigable Waters and Soils Owned by States is to be Determined by State Law.

In addition to its determination of state law, the Court of Appeals also apparently concluded that federal law controls the determination of the boundary of the beds and shores of navigable waters held by the State. *United States v. PUD, supra*, at 1505. The Court of Appeals cited and quoted from *Howard v. Ingersoll*, 54 U.S. [13 How.] 409 (1851). In concluding that federal law applies and in concluding that the holding of the Court in *Howard v. Ingersoll* applies, the Court of Appeals erred on several grounds.

The establishment of the boundary of the beds and shores of navigable waters held by a state in its sovereign capacity is not a question of federal law, but is rather a question of state law. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-371 (1977). Such conclusion is inescapable since the original States acquired their sovereign prerogatives, including navigable waters and the soils under them, as a result of the Revolutionary War. *Martin v. Lessee of Waddell, supra*, at 410. The only exception is where the original States ceded part of their sovereignty to the federal government under the United States Constitution. *Id.* The original States never granted power to the federal government to determine a State's sovereign rights, powers and boundaries

for navigable waters and the soils under them. Since new States have been admitted on an equal footing with the original States, the new States, including Washington, have the full sovereign power and right to establish the law for determining boundaries.[6]

E. The Court of Appeals Erroneously Applied Federal Law.

Not only did the Court of Appeals err in its conclusion that federal law is applicable to the determination of the line of ordinary high water, but the Court of Appeals also erred in its determination of federal law. The Court of Appeals cited, as authority for federal law in the

[6]The U.S. District Court relied on *Oregon v. Corvallis Sand & Gravel Co.* and concluded that the law controlled the disposition of this issue. No party assigned error or disagreed with this conclusion on the appeal to the Ninth Circuit Court of Appeals.

determination of ordinary high water, *Howard v. Ingersoll, supra.* A close reading of *Howard v. Ingersoll* shows that *Howard v. Ingersoll* did not involve navigable waters and did not involve the establishment of the boundaries between property owned or acquired by a State as part of its sovereign prerogatives and property held by others.

Howard v. Ingersoll involved the construction of a Cession Agreement by the State of Georgia by which Georgia ceded its western territory to the United States. In that Cession Agreement, the boundary of the territory was described as the "west bank of the Chattahoochee River." The issue before the Court was the determination of the "west bank of the Chattahoochee River." The Court, in *Howard v. Ingersoll*, was not establishing

the line of ordinary high water on a navigable river for the purpose of determining the boundary or extent of a State's sovereign prerogatives and rights. *Howard v. Ingersoll* relates only to the construction to be given to specific provisions in the Cession Agreement which was before it. The reliance by the United States Court of Appeals for the Ninth Circuit on *Howard v. Ingersoll* for the determination of the law with respect to the line of ordinary high water is misplaced.

CONCLUSION

The determination of the line of ordinary high water as the boundary of the sovereign rights and prerogatives of a state with respect to navigable river is a question to be determined under state law. The Supreme Court of the State of

Washington has before it the question of the establishment of the line of ordinary high water under Washington law on the Pend Oreille River. The Court of Appeals incorrectly determined the law of the State of Washington and erroneously applied federal law which was incorrectly determined by the Court to establish the boundary of the sovereign rights and prerogatives of the State of Washington on the Pend Oreille River. The Court of Appeals should have certified the legal issue to the Supreme Court of the State of Washington or, at least, should have stayed its opinion pending the determination of state law by the Supreme Court of the State of Washington.

The Joint Petition for Writ of Certiorari should be granted and the Opinion of the Ninth Circuit Court of

Appeals at 926 F.2d 1502 as it relates to the establishment of the line of ordinary high water should be stayed pending the ruling of the Supreme Court of the State of Washington in *Public Utility District No. 1 of Pend Oreille County, et al. v. Tombari Family Limited Partnership, et al.*, Supreme Court of Washington Docket No. 57239-9. If a writ of certiorari is issued herein and if the decision of the Supreme Court of Washington in *Public Utility District No. 1 of Pend Oreille County, et al. v. Tombari Family Limited Partnership, et al.*, is inconsistent with the determination of state law by the Ninth Circuit Court of Appeals and the United States District Court, the matter should be remanded to the Ninth Circuit Court of Appeals for further consideration in light of state law announced by the

Supreme Court of the State of Washington. If a writ of certiorari is issued herein and if the opinion of the Supreme Court in *Public Utility District No. 1 of Pend Oreille County , et al. v. Tombari Family Limited Partnership, et al.*, is not inconsistent with the determination of State law by the Court of Appeals and the United States District Court, then the Writ of Certiorari should be dismissed as improvidently granted.

DATED this 2nd day of August, 1991.

Respectfully submitted,

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